No. 10,662

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WELLS FARGO BANK & UNION TRUST CO., Executor of the Estate of Ben F. Sternheim, Deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Upon Petition to Review a Decision of the Tax Court of the United States.

PETITIONER'S CLOSING BRIEF.

F. M. MCAULIFFE,
L. C. BAKER,
HELLER, EHRMAN, WHITE & MCAULIFFE,
Nevada Bank Building, San Francisco,
Attorneys for Petitioner.

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Table of Authorities Cited

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Although not expressly so stated, the burden of respondent's argument is that *Merchants National Bank v. Commissioner of Internal Revenue,* 320 U.S. 256, requires an approach to this case different from that heretofore adopted by this and other Courts in cases of similar character. Respondent contends, therefore, that irrespective of the merits of the points raised by petitioner in its opening brief the Tax Court was right for the wrong reason.

The identical question is raised in *Commissioner of Internal Revenue v. Wells Fargo Bank & Union*

Trust Co., Executor of the Estate of Mary A. Hume, Deceased, No. 10,649, now pending before this Court. For the purposes of the question here involved the facts of the two cases are similar in substance. Consequently, the decision in the *Hume* case will control here.

Petitioner herein stands upon the position taken with regard to this question in the brief for respondent in the *Hume* case. To repeat the argument here in full would thus entail surplus effort. Suffice it to say that the *Merchants Bank* case laid down no new principle. The Court merely applied a rule originally stated in *Ithaca Trust Co. v. United States,* 279 U.S. 151, 49 S. Ct. 291, 73 L.Ed. 647, a case upon which this Court and other Courts have relied in concluding that under circumstances similar to those of the instant case the value of charitable remainders was not too uncertain to admit of determination. *Commissioner of Internal Revenue v. Bank of America, N.T. & S.A.,* 133 Fed. (2d) 753. In the *Merchants Bank* case the power to invade principal was much broader than that involved herein. The direction to provide for the *happiness* of the life tenant with liberality would authorize the trustee to invade principal without regard to the independent means of the beneficiary. The opinion indicates that this was the determinative factor in the case. In the present case the Court has found that in the absence of the withdrawals which actually occurred there was no reasonable probability of invasion of principal. It is inconsistent, therefore, in the light of all of the

circumstances prevailing at the date of death, to contend that it is necessary to have a standard by which to measure the amount of withdrawals.

Respondent advances the further argument that the purpose of the testator was to guard against unforeseen contingencies, and based upon this, he contends that there was no method of determining the amount which might be diverted upon the occurrence of such unforeseen events. The position taken by petitioner in its opening brief that the diversions which actually occurred were accidental, and unforeseen at the date of death, is seized upon as a concession in this regard.

This argument is unsound, first because it begs the whole question, and second because if it were carried to its ultimate conclusion it would strike at the very root of the established method of valuing future interests for estate tax purposes. The question which the Tax Court was called upon to determine was as to what lay within the realm of practical foreseeability—not what was unforseeable. If, as here, it was practicably foreseeable that the possibility of resort to principal was so remote as to be negligible, that which was unforeseeable was not an element to be considered. If unforeseeability were to be accorded any weight, all valuations of future interests for estate tax purposes would be at an impasse, and thus is reached the second reason for concluding that respondent's argument is unsound.

If this argument were to prevail it should cut both ways so as to give the taxpayer a corresponding

benefit. Thus, in a situation such as that involved in *Ithaca Trust Co. v. United States* it was not practically forseeable that the life tenant would die prior to the expiration of her life expectancy, but respondent's theory would have required this factor to be taken into consideration so as to reduce the taxable value of the life estate. In the *Hume* case, pending before this Court, as aforesaid, it was not foreseeable that the life tenant would die soon after the trust for her benefit had been set up. But under respondent's theory this Court would be required to hold that the death of the life tenant made certain the value of the charitable remainder irrespective of what the Court might otherwise have thought the effect of the *Merchants Bank* case would have been if the life tenant had lived.

It is clear, however, that unforeseeability has no place in the valuation of future interests. Such valuations are based upon what is reasonably foreseeable from the standpoint of experience. Thus, in the case at bar it was reasonably foreseeable that under all of the circumstances there would be no invasion of the principal. This is the factor which should govern the valuation of the charitable remainder—*this is the standard by which the value may be determined in fulfillment of the requirement of the Ithaca Trust Co. case and the Merchants Bank case.*

If this Court should conclude that the *Merchants Bank* case does not overrule *Commissioner v. Bank of America* (supra), the question raised by petitioner's opening brief remains. Respondent does not

dispute the soundness of the principle relied upon by petitioner. He contends only that the action of the trustee in making payments from principal indicates a liberal construction by the parties of the so-called emergency clause, which was implicit in the situation existing at the date of death. In the first place this argument is based upon an assumption unwarranted by the facts; that is, that the action of the trustee amounted to a liberal construction of the emergency clause. The facts show that the life tenant's main source of income had been temporarily eliminated by an accidental situation which ran counter to what was reasonably foreseeable at the date of decedent's death. It was the presence of this source of income, together with other matters, which made negligible the probability of resort to principal. There was nothing upon which a prediction could be based that this source of income would be temporarily unavailable. The uncertainty in this regard was not "appreciably greater than the general uncertainty that attends human affairs". *Ithaca Trust Co. v. United States* (supra). The life tenant was thus affected by an emergency. To resort to this clause in such a situation does not indicate a liberal construction, but merely compliance with the original intent of the testator.

In the second place this reasoning is extraneous to the findings and the approach to the matter adopted by the Tax Court. The vice of the findings and conclusion of the Tax Court lies in the reliance upon an unforseeable later event as a base for determining

what was forseeable at an earlier date. This approach is self-contradictory upon its face and it is not cured by arguing that a liberal construction was adopted by the parties.

Dated, San Francisco,
April 12, 1944.

Respectfully submitted,
F. M. McAuliffe,
L. C. Baker,
Heller, Ehrman, White & McAuliffe,
Attorneys for Petitioner.